

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**JOE J. SALAZAR,**

**Plaintiff,**

**v.**

**Civ. No. 04-404 JH/WDS**

**ARTHUR HASSALL, et al.,**

**Defendants.**

**ORDER ADOPTING PROPOSED FINDINGS  
AND RECOMMENDED DISPOSITION (DOC. 167)**

**THIS MATTER** is before the Court on *Magistrate Judge's Proposed Findings of Fact and Recommended Disposition* (Doc. 167, entered on September 21, 2006), which addressed *Plaintiff's Rule 37(b)(2) Motion for Sanctions for Spoliation of Evidence* (Doc. 148). On October 2, 2006 plaintiff Joe J. Salazar filed *Plaintiff's Objections to Proposed Findings of Fact and Recommended Disposition and Motion for Rehearing* (Doc. 170), to which defendants filed *Defendants' Response in Opposition to Plaintiff's Objections to Proposed Findings of Fact and Recommended Disposition and Motion for Rehearing* (Doc. 173). Plaintiff thereafter filed his Reply (Doc. 183). Briefly stated, the plaintiff asks that a default judgment be entered in his favor against the defendants as a sanction for the spoliation of evidence.

The court has reviewed the proposed findings and recommended disposition, Mr. Salazar's objections to the proposed findings and recommended disposition, as well as the defendants' response to the objections and Mr. Salazar's reply to the defendants' response, the record of this case and relevant law, and has determined that it will adopt the *Magistrate Judge's Proposed Findings of Fact and Recommended Disposition* (Doc. 167), and will overrule the

plaintiff's objections.

At the outset, the court notes that the standard of review is not the "clearly erroneous or contrary to law" standard that applies to appeals of magistrate orders. **28 U.S.C. § 636(b)(1)(a).** Rather, the review is a de novo determination of matters referred to a magistrate for proposed findings of fact and recommendations. **28 U.S.C. §636(b)(B) and (C).**

The court has conducted a *de novo* review of the plaintiff's objections to the Magistrate Judge's proposed findings and recommended disposition. For the most part, Mr. Salazar repeats the arguments in the objections that he raised in his Rule 37(b)(2) Motion for Sanctions and related submissions. The court finds these arguments to be without merit for the reasons stated by the Magistrate Judge in the proposed findings and recommended disposition.

Additionally, the Court notes that the Motion for Sanctions was brought pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. That rule contemplates sanctions where a party has violated a discovery order of the Court. Plaintiff does not contend, and does not produce any evidence, that the defendants violated a discovery order. Thus, sanctions will not be assessed pursuant to Rule 37(b)(2).

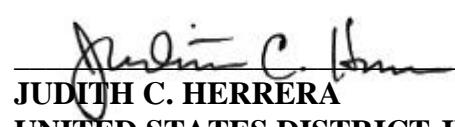
While the Court does have inherent authority in the management of its affairs to order sanctions where spoliation of evidence has occurred, *Miller v. Mid-Continent Aircraft Service, Inc., 1998 U.S. App. LEXIS 2739* (10th Cir. 1998), in order to sanction a party for spoliation of evidence, the Court must consider 1) the degree of culpability of the party who lost or destroyed the evidence, and 2) the degree of actual prejudice to the other party. *Id.* Here, plaintiff has not established that any relevant evidence has in fact been lost or destroyed. Additionally, beyond conclusory and vague allegations, plaintiff has not shown that he has suffered actual prejudice. Notably, in his Affidavit attached to his objections to the magistrate's proposed disposition, he

addresses e-mails related to audits, but produces no evidence that the e-mails are the only source of evidence establishing the work effort required of plaintiff in completing the audits.

**IT IS THEREFORE ORDERED** that *Plaintiff's Objections to Proposed Findings of Fact and Recommended Disposition and Motion for Rehearing* (Doc. 170) are hereby **OVERRULED** and **DENIED**.

**IT IS FURTHER ORDERED** that the Court **ADOPTS** the *Magistrate Judge's Proposed Findings of Fact and Recommended Disposition*. (Doc. 167).

**IT IS SO ORDERED.**



JUDITH C. HERRERA  
UNITED STATES DISTRICT JUDGE